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No. 29

# In the Supreme Court of the United States

OCTOBER TERM, 1947

FEDERAL TRADE COMMISSION, *Petitioner,*

vs.

NORTHWESTERN PORTLAND CEMENT COMPANY, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR THE RESPONDENT

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1012 Northern Life Tower,
Seattle 1, Washington.

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## BRIEF FOR THE RESPONDENT

### INTRODUCTION

This brief is filed on behalf of Northwestern Portland Cement Company, a corporation of the State of Washington, engaged in business solely in that state. It will be referred to herein as "Northwestern Portland" and should not be confused with another respondent in these related cases named Northwestern States Portland Cement Company, which is an Iowa corporation with its plant located in that state.

Northwestern Portland has, since the very inception of these proceedings before the Federal Trade Commission, taken the position that its situation is so distinctive and different as to require separate treatment. The failure of the Commission to adduce any evidence which would in any way involve this respondent in the claimed combination or conspiracy is

especially significant in the face of the fact that the Commission was at the very outset put on notice of the position taken by Northwestern Portland.

We shall confine this brief solely to the position of Northwestern Portland in this case and to the narrow questions whether there is any evidence in the record which would warrant findings against Northwestern Portland and whether, in fact, any findings were made by the Commission upon which an order against Northwestern Portland could be properly based.

Insofar as the questions which affect the industry and all respondents generally are concerned, we shall adopt and rely upon the briefs filed on behalf of the other respondents in these connected cases.

## OPINION BELOW

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 16761-16821) is reported in 157 F. (2d) 533.

## STATEMENT OF THE CASE

Northwestern Portland Cement Company is a corporation organized under the laws of the State of Washington with its cement manufacturing plant at Grotto, Washington, a village in the westerly foothills of the Cascade Mountains, approximately eighty miles northeast of Seattle, and with its offices in Seattle (R. 3244, 15070). The capacity of its plant is but 1500 barrels per day and it has limited storage facilities (R. 15070).

Northwestern Portland began its operations in May of 1928. After making some sales in Oregon from

June of 1928 to sometime in 1929, it discontinued doing any business in Oregon because it lost money on every barrel of cement which it sold in that state (R. 3250-51). All of its product has since been sold in western and central Washington (R. 15070). The Commission specifically found that "Northwestern Portland makes no sales or shipments outside the State of Washington" (Fdgs. 2, R. 15979).

Northwestern Portland is a wholly independent concern. It is not affiliated or connected in any manner with any other cement manufacturer and none of its officers or directors are officers or directors of any other cement company (R. 15070).

When Northwestern Portland began operating in 1928 there were two other cement manufacturing plants in western Washington — one, the plant of respondent Superior Portland Cement Company, located at Concrete about 100 miles from Seattle, and the other, the plant of Olympic Portland Cement Company located at Bellingham, about 90 miles from Seattle (R. 3170). Olympic was not joined in these proceedings by the Commission. Both Superior and Olympic at that time sold almost entirely at f.o.b. mill prices (R. 3170-72). From the very commencement of its operations Northwestern Portland quoted destination prices and sold on a delivered price basis as a method of competing with the existing plants (R. 3172, 3193). Thereafter, to meet Northwestern Portland's competition, Superior began selling on a delivered price basis (R. 3172, 3193). In 1929 the Pacific Coast Cement Company began operating its cement manufacturing

plant in Seattle and it likewise began selling on a delivered price basis (R. 3169, 3172, 3193). A price war ensued in western Washington which lasted until June, 1931 (R. 3177-78, 3194).

Except in those instances where the government requests f.o.b. mill quotations, Northwestern Portland sells at destination prices. Dealers and contractors prefer to buy at destination prices (R. 3193, 16786). In fixing its destination prices, the company determines the mill net it wishes to receive and adds freight to the point of delivery. If upon inquiry (R. 15074) it learns that another company is quoting a lower price, Northwestern Portland reduces its price to meet that lower price if it wishes to compete in that area.

Cement manufactured in Oregon and California is shipped into the state of Washington for sale in the southerly part of the state of Washington just north of the Columbia River, the dividing line between Oregon and Washington. This is considered a distress territory insofar as cement prices are concerned. Prices are so low that Northwestern Portland cannot and does not sell in that area (R. 3185-87, 3250-51).

Northwestern Portland became a member of the Cement Institute in July of 1933 after the Cement Code Authority was created pursuant to appeals to cooperate with the N.I.R.A. (Fdgs. 1(2w), R. 15972). No officer or employee of Northwestern Portland has at any time held any position with, or office in, the Cement Institute (R. 15072).

Northwestern Portland did not make use of the contract checking, credit reporting, or other services fur-

nished by the Institute. In fact, the Cement Institute freight rate service has never covered any of the territory in which Northwestern Portland operates.[1]

Northwestern Portland has never been a member of the Cement Manufacturers Protective Association or of the Pacific Coast Cement Institute (R. 3473, 15072).

Northwestern Portland and other western Washington cement companies have entered f.o.b. mill bids whenever requested to do so by the Government. Northwestern Portland has consistently made non-identical f.o.b. mill bids in response to Government invitations. Several non-identical f.o.b. mill bids by Northwestern Portland conforming in all respects with the government's invitations were described by the Commission's witnesses (R. 462, 3730, 3734). The only instances in which Northwestern Portland did not make non-identical f.o.b. mill bids were two bids made during the NRA Code period, to-wit, one on February 21, 1935 (all bids rejected) (R. 463),[2] and the other, on April 17, 1935 (R. 466), and one bid made on August 20, 1935, during the "twilight period" following the *Schechter* decision when the President asked for "voluntary compliance" (R. 468-71).[3]

Various other proposals, and tabulations of bids submitted in response thereto, were offered and received in evidence, showing that the government requested f.o.b. mill bids and received f.o.b. mill bids from companies in western Washington, and that the

[1]Fdgs. 8(c), R. 16008; Com. Ex. 595 E; R. 1553-54, 5300, 5344, 14976, 15071.

[2]Com. Ex. 111 F., admitted R. 864.

[3]Com. Ex. 112 D., admitted R. 865.

bids, and the net delivered cost to the government under each bid, were non-identical.[4] Other offers of proof were made to establish that the respondent companies in western Washington had made other non-identical f.o.b. mill bids, none of which had reference to so-called control clauses, equalization clauses or destination costs, at various times for different government projects, but these offers were rejected by the Examiner.[5]

Admiral Peoples, who was in charge of the U. S. Procurement Division, testifying on behalf of the Commission, admitted bids had been received from the Pacific Northwest companies on an f.o.b. mill basis (R. 3650), and at different prices (R. 3710).

The Admiral specifically included Northwestern Portland in the list of companies which made f.o.b. mill non-identical bids (R. 3662). The same testimony was given by P. I. Taylor, another witness for the Commission, and the Commission's counsel conceded this to be the situation (R. 15162-dd, 6476, 6477, 15162-ee, 6479, 15162-ff).

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[4]R. 6727-29, and Resp. Exs. 370 A-K, 371 A-K, 372 A-W, 373 A-M.

[5]R. 14983, 14985, Resp. Ex. for id. 3659 Z11, Z34-39, incl. Z42, Z52, Z55, Z57, Z59, and Z69. In the Circuit Court of Appeals, Northwestern Portland renewed its motion made before the Commission to adduce additional evidence to prove that its bids complied in all respects with the government's invitations and were non-identical, but the court denied the motion (R. 16816). Northwestern Portland hereby renews its Motion for Leave to Adduce Additional Evidence (R. 16646) and the offer of proof on which said motion is based.

We shall discuss the various practices which the Commission claims implemented the alleged combination or conspiracy in the portion of this brief devoted to Argument, to avoid repetition.

## SUMMARY OF THE ARGUMENT

I. *There are no findings against Northwestern Portland upon which an order affecting it can be based.*

II. *There is no evidence to support any findings or order against Northwestern Portland.*

III. *No violation of the Clayton Act, as amended, is established as against Northwestern Portland.*

IV. *Since Northwestern Portland makes no sales or shipments outside the state of Washington and does not compete in interstate commerce, the Commission had no jurisdiction over it in this proceeding.*

## ARGUMENT

### I. There are no findings against Northwestern Portland upon which an order affecting it can be based.

There are but two Findings which refer to Northwestern Portland or identify it. They are as follows:

*Finding 1 (2w)* (R. 15972)

> "'Respondent Northwestern Portland Cement Company (hereinafter frequently referred to as 'Northwestern Portland') is a corporation organized and existing under the laws of the State of Washington, with its principal place of business in Seattle, Washington. It is a producer of cement and its manufacturing plant is located at Grotto, Washington. It became a member of the Institute in July, 1933."

*Finding 2* (R. 15979)

"* * * Northwestern Portland makes no sales or shipments outside the State of Washington, * * *"

A third finding refers to western Washington and should therefore be set forth at this point:

*Finding 7(n)* (R. 16,000)

"The multiple basing-point delivered-price system was extended to western Washington in 1931. Its introduction there followed a price war which commenced when two new mills began operating in that territory, one in 1928 and the other in 1929, and was approximately coincident with the leasing of one of these new mills by Superior Portland."

It will be noted that Finding 7(n) does not mention this respondent, Northwestern Portland, does not indicate which cement companies are claimed to have used the alleged price system, whether one or more or all, and the finding certainly does not indicate the use of the alleged system as the result of a conspiracy or combination.

Nowhere else in the 171 pages of Findings is this respondent mentioned. Surely, it cannot be properly contended that the Findings just quoted are a sufficient basis for finding Northwestern Portland a party to any conspiracy. The Commission, at page 90 of its brief, shows its keen awareness of a lack of Findings sufficiently definite or specific to show the participation of particular respondents in the alleged combination. We assume Finding 6(a) (R. 15984) quoted at page 91 of the Commission's brief, is there set forth on the theory that it will in some way sup-

port the Commission's contention that the Findings are sufficiently definite. But this Finding does not state that each of the respondents participated in all or any of the activities relied upon by the Commission. It merely states that "some" respondents have participated in substantiallly all of the activities and that "other" and "a few" respondents have participated in some of the activities. This is a far cry from a finding that *every* respondent in this case participated in some of the activities. In the face of the record these generalizations certainly cannot affect Northwestern Portland.

In anticipation of the contention which the Commission had every right to expect the respondents to make in their briefs, and which it knew this respondent, Northwestern Portland, would surely make in its brief, the following argument appears at page 92 of the Commission's brief:

> "We submit that there is no merit to respondents' contention that the findings do not adequately specify the participation of particular respondents in the acts and practices by which the combination was effectuated. We also point out that the findings, notwithstanding the generality of some of them with reference to the particular respondents involved, do in many instances specify and identify. For example, 45 of the 75 respondent producers, or 60% of them, are identified as having submitted identical bids to public agencies (Fdgs. 9(b)-(c), R. 16023-8)."

The argument contained in the foregoing paragraph is just as general and ineffectual to hold Northwestern Portland in this case as are the findings themselves.

It is stated that, notwithstanding the generality of some of the findings with reference to the particular respondents involved, they "do in many instances specify and identify." But, for the moment, Northwestern Portland is not interested in the question whether the findings "specify and identify" "some" of the respondents or "many" of the respondents. For the purposes of this brief the question is whether the findings "specify and identify" Northwestern Portland. Other than in the two findings we have heretofore quoted in this brief, the name of Northwestern Portland Cement Company nowhere appears in the 171 pages of findings entered by the Commission.

It does not avail the Commission to cite as an example the fact that 45 of the 75 respondent producers, or 60 per cent of them, are identified as having submitted identical bids to public agencies, for an examination of the Commission's reference (Fdgs. 9(b)-(c), R. 16023-8), shows that Northwestern Portland is not named or identified as one of the respondents having submitted identical bids to public agencies. The fact that 45 other respondents are named does not make the findings sufficiently definite to warrant holding this respondent, which is not named.

As was said by Judge Major in the opinion of the court below, "the entire findings are permeated with uncertain and indefinite terms" (R. 16782).

The statement in Finding 7(n) that "the multiple basing-point delivered-price system was extended to western Washington in 1931" cannot be deemed a

finding that Northwestern Portland was a party to any combination or conspiracy. Further, any finding that the "delivered-price system" was brought to western Washington as a result of any combination, conspiracy, or concerted action amongst several respondents would fly in the face of the uncontradicted testimony in the record, which is that Northwestern Portland began the independent use of the delivered or destination price method in western Washington upon the commencement of its operations in 1928 as its means of competing with the existing cement manufacturers who were then selling on an f.o.b. mill basis only (R. 3172, 3193). The reason for Northwestern Portland's use of the delivered price method as a means of competition is obvious, for the record shows clearly that purchasers of cement prefer to buy on a delivered price basis so that they will know the actual cost of the cement to them without the necessity of calculations by them. Counsel for the Commission have, in fact, conceded that buyers of cement, as a matter of preference, customarily buy on the basis of the laid down delivered cost to them at the place of use (R. 8153, 9444, 9446, 9447, 10155).

The Commission mentions Superior and Northwestern Portland on pages 102-103 of its brief and on page 103 refers to certain pages of the Record and to certain exhibits as supporting its claim that the "multiple basing-point delivered-price system" was extended to western Washington in 1931. An examination of both the portions of the Record and the exhibits referred to reveals that they do not offer any support for the Commission's claim. Since each

of the Commission's references to Record and exhibits is fully described in a pertinent footnote in Superior's brief we shall avoid repetition by referring the court to that brief.

As we read the Commission's brief, it seems to suggest that the court should strain to supply omissions in the Commission's findings and to make that definite and certain which is, in fact, indefinite and uncertain. In answer to such a contention it is sufficient to quote the language of this court in *Atchison, T. & S.F.R. Co. v. United States* (1935), 295 U.S. 193, 201, where, in discussing ambiguous findings of the Interstate Commerce Commission, the court said:

> "Its report does not disclose the basic facts on which it made the challenged order. This court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order."

It is submitted that the court below properly held that the findings are not sufficient to support the order to cease and desist.

**II. There is no evidence to support any findings or order against Northwestern Portland.**

We believe it is clear that the Commission made no findings upon which an order against Northwestern Portland can be based, but we shall go a step further and say with conviction that there is no evidence in the record which would sustain a finding that Northwestern Portland was a party to any combination or conspiracy. As a last resort the Commission attempts

to draw the inference that Northwestern Portland was a member of an unlawful combination or conspiracy from its claim that respondents used the delivered price system, which the Commission denominates "the multiple basing-point delivered-price system." Whatever it may be denominated, the question is, does the record sustain any claim or inference that Northwestern Portland sold at delivered prices as the result of a combination or conspiracy. We have already pointed out that the uncontradicted evidence in this case is to the effect that Northwestern Portland, independently and alone, began to sell at delivered prices when it commenced doing business in 1928 as a means of competing with the existing cement companies who were then selling on an f.o.b. mill basis (R. 3172, 3193).

There is not a scintilla of evidence, not a word or a phrase in the record, to indicate that Northwestern Portland's continued use of this pricing method was the result of anything except its original independent action.

Northwestern Portland is in the fortunate position of having clear and unquestioned testimony in the record which establishes that its use of delivered prices definitely did not originate in any combination or conspiracy. This being true,—in the complete absence of any further evidence on this point,—there is no foundation for any inference that the continued use of this method by Northwestern Portland became illegal as a result of a combination or conspiracy.

Since, as we have just shown, the use of delivered prices by Northwestern Portland was not the result

of a combination or conspiracy but the result of independent competitive action taken by Northwestern Portland, it would be unnecessary for us to pursue the Commission's contention that the respondents (and the word is used in its most general sense by the Commission without any attempt to be specific) took collective action in certain respects, having the effect and purpose of maintaining what the Commission denominates a "multiple basing-point delivered-price system." Northwestern Portland would, however, like to address itself to this contention of the Commission, insofar as it affects this respondent, for it will develop the interesting fact that the record contains no evidence which would support a finding that Northwestern Portland took any of the actions or indulged in any of the practices claimed by the Commission as a basis for its inference of combination and conspiracy.

The instrumentalities or implementations of the alleged combination or conspiracy relied upon by the Commission are eight in number and appear under the lettered headings "(a)" to "(h)", inclusive, on pages 69 to 80 of the Commission's brief. We shall refer to them in the order in which they there appear.

***(a) Freight Rate Books***

None of the mills in western Washington ever received or used the Cement Institute's freight rate service. In fact, it is uncontradicted that the Cement Institute freight rate service at no time covered any of the territory in which Northwestern Portland operates and markets cement.[6]

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[6]Fdgs., Par. 8(c), R. 16008; Com. Ex. 595 E; R. 1552, 3196, 5300, 5344, 13230, 14976, 15071.

All the furor concerning freight rate services has no application to this respondent because the freight rates from Grotto, from Bellingham, and from Concrete (the sites of three mills) are identical to most of the principal markets in the area in which Northwestern Portland sells cement. The rates are the same from each of these mills to Seattle, to Tacoma, to Olympia, to Vancouver, and to Yakima. Everett is the only destination of importance in western Washington where freight rates from these mills differ (R. 3232-33).

*(b) Sales f.o.b. mill and land grant rates*

The Commission states that respondents refused to submit f.o.b. mill prices to the Government and that when they did submit such bids to the Government purchasing officers, they calculated their f.o.b. mill prices by subtracting from the delivered price the freight rate from bidder's mill to delivery point. Yet, insofar as Northwestern Portland is concerned, the Commission's own witnesses, Admiral Peoples and P. I. Taylor, both testified that the western Washington companies, in response to calls for f.o.b. mill bids, did submit non-identical f.o.b. mill bids.[7]

Admiral Peoples named Northwestern Portland as one of the companies which in all respects complied with the invitations in submitting bids (R. 3662, 6525-29). We except, of course, from the statement we have just made, the two bids submitted by Northwestern Portland during the NRA Code period and

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[7]R. 3650, 3662, 6476, 6477, 15162-dd, 15162-ee, 15162-ff.

the one bid submitted during the "twilight period" immediately following the *Schechter* decision, to which we have referred earlier in this brief. For specific instances in the record showing non-identical f.o.b. mill bids by Northwestern Portland we refer to R. 460-62, 3730 and 3734.

Government officials were satisfied with the bidding being done by the Washington companies. Commission's exhibit 112 A-D, referred to at R. 865, contains a letter from the Acting Commissioner of the Bureau of Reclamation to the Secretary of the Interior in which this statement appears: "The prices bid on cement by the Washington companies are regarded by this office as very attractive."

The Commission at one point in its brief makes the statement that the Pacific Coast companies obtained their land grant rate information by virtue of their membership in the Pacific Coast Cement Institute. Suffice it to say, that Northwestern Portland was never a member of the Pacific Coast Cement Institute (R. 3474, 15072).

***(c) Involuntary or punitive bases***

There is not a syllable of evidence to indicate that Northwestern Portland had any connection with so-called punitive bases, or that any such bases have ever existed in the area in which it does business.

***(d) Truck transportation***

Again, there is no evidence in the record that Northwestern Portland refused to allow trucking at any time or that it imposed a differential or any extra charge for loading buyers' trucks at the mill.

*(e) Diversion in transit*

The Commission states that the Code of Ethics adopted by respondents when the Institute was organized declared diversions in transit to be an unfair trade practice. Northwestern Portland did not become a member of the Institute until July of 1933, and the Commission will not deny that the Code of Ethics was cancelled in June of 1933. The Commission further states that the Compendium approved by the trustees of the Institute after the termination of the NRA Code recommended the use of a standard form of sales contract containing a provision against diversions in transit, but Northwestern Portland has never used any contract form, nor has it used any non-diversion stamp, and Northwestern Portland at no time followed the so-called Compendium (R. 15072).

*(f) Standardization of terms of sale*

Both Hollister, President, and Young, Sales Manager, of Northwestern Portland, testified that inquiries revealed many instances of differentials in the matter of terms of sale, some being in its favor and some adverse to it, naming among them the matter of prices, discount periods, prepayment of freight, and cloth sack allowances (R. 15074).

*(g) Classification of dealer business*

Northwestern Portland did not classify its customers (R. 15073).

*(h) Boycott of dealers handling imported cement*

Officials of this respondent testified that they sold cement to dealers in imported cement and never boy-

cotted or threatened to boycott dealers who handled imported cement (R. 15074). There is no evidence to the contrary.

We shall refer briefly to but a few other points made by the Commission in its broad generalizations against "respondents."

The Commission refers to the action of "the respondents" in collecting and disseminating details concerning production, shipments, etc. Northwestern Portland furnished statistics to the United States Bureau of Mines, only, and these concerned only production. No sale or shipment statistics were furnished by Northwestern Portland to anyone (R. 15072).

The Commission in its brief and during the taking of testimony referred to the answers "of the respondents" to the Clark-Burns Questionnaire. But Northwestern Portland filed no answer to the Clark-Burns Questionnaire. The statistics and information quoted from this Questionnaire by the Commission in the record and brief are devoid of references to any information furnished by Northwestern Portland and it furnished none.

Since the Commission refers in its brief to the testimony of the economic experts, we should point out that their testimony discussed in Finding 22 (R. 16122), is not applicable to Northwestern Portland or to the other western Washington companies (See for example, R. 6632 *et seq.* and 6650 *et seq.*).

We note that at page 95 of its brief the Commission contends that to charge the various members of a trade association with complicity in a combination it

is not necessary to show that "each member" participated in "each activity." Surely, however, it must be shown that "each member" participated in "some activity" if each member is to be held.

In its attempt to bolster its case against Northwestern Portland the Commission refers to two items which we shall notice briefly. They both appear at page 103 of its brief:

The first is the statement that the four western Washington mills met for the purpose of promoting the adoption of common rates by different railroads. An examination of the evidence (R. 3251-53, 13232), will show that the meeting referred to occurred in November, 1929, and was attended by a freight rate expert and representatives of the four western Washington companies. The meeting was held to discuss proposed rates from Seattle to branch line points on three railroads, which would have affected all of the cement companies involved. The minutes of this meeting (Com. Ex. 1199 A-D) show that the companies in fact could not agree upon rates and that at the termination of the meeting they intended to make independent, differing recommendations to the railroads involved. Furthermore, neither the price of cement nor the adoption of uniform rates was discussed.

The second point made by the Commission in its brief on page 103, in an effort to hold Northwestern Portland, is that E. P. Lucas, President of Superior, was a Trustee of the Institute and a Director of District 12, and as such, it is claimed, he represented the cement producers of Washington and Oregon in Institute activities. Northwestern Portland does not know

what Mr. Lucas' activities in the Institute were, nor are they of any consequence to this respondent. It would be a strange rule of agency that would hold Northwestern Portland responsible for any action taken by Mr. Lucas, who was neither shareholder, director, officer, nor employee of Northwestern Portland, nor in any sense authorized to bind it.

The very fact that the Commission leans upon such fragile reeds in its endeavor to hold Northwestern Portland in this case should be proof of its own realization of the weakness of its case.

In the final analysis the case against Northwestern Portland is reduced to bare membership in the Institute. That in itself cannot conceivably be sufficient to warrant any order against this respondent.

We agree wholeheartedly with the court below that no conspiracy has been shown. Even Judge Evans in his dissenting opinion seemed to agree that the evidence, in any event, failed to show that at least one or more of the respondents were parties to any claimed conspiracy (R. 16821), and we cannot but believe that, among others, he had Northwestern Portland in mind, and the proceedings against it should be dismissed for complete failure of proof.

**III. No violation of the Clayton Act, as amended, is established as against Northwestern Portland**

It is the contention of the Commission that, pursuant to the combination charged in Count I, and repeated in Count II, Northwestern Portland discriminated in price, in violation of Section 2 of the Clayton Act, as amended, between different purchasers of com-

modities of like grade and quality. Inasmuch as the Act applies only to "any person engaged in [interstate] commerce," it cannot have any application to this respondent. Northwestern Portland is not engaged in interstate commerce and does not compete in interstate commerce, hence there can be no discrimination in prices in interstate commerce by it.

Referring to the Robinson-Patman Bill, Senate Committee Report No. 1502 dated February 3, 1936, stated:

> "The special definitions of section 1 of the Clayton Act will apply without repetition to the terms concerned where they appear in this bill, since it is designed to become by amendment a part of that act. Thus the term 'commerce,' as used therein, becomes by force of those definitions interstate and foreign commerce of the United States and commerce in and between its various possessions."

Henry Ward Beer, in his work, Federal Trade Law and Practice (1942), p. 69, states:

> "The jurisdiction of the Commission under section 3 and subdivisions (a), (c), (d), (e) and (f) of section 2 of the Clayton Act would thus seem to be the same as that of the Commission under section 5 of the F.T.C. Act and the doctrine of *F.T.C. v. Bunte Brothers, Inc.* (312 U.S. 349), is applicable to these sections of the Clayton Act as well as to section 5 of the F.T.C. Act. Therefore, the Commission, under these sections of the Clayton Act, cannot regulate the wholly intrastate aspects of a respondent's business even though he is also engaged in interstate or foreign commerce and the manner in which he con-

ducts his intrastate business may have a perceptible effect on interstate or foreign trade."

Northwestern Portland competes with out-of-state cement only when bidding on invitations from the federal government. The record shows that the bids of Northwestern Portland on government invitations conformed to the law and the invitations and were, except for the NRA period, non-identical with other bids submitted (*ante*, pp. 15-16). The identical bids were due to the provisions of the NRA Code and not to Northwestern Portland's usual pricing policies.

On commercial business, the record is clear that Northwestern Portland does not compete with out-of-state cement. All of its product is sold in western and central Washington within a comparatively short radius of its plant (R. 15070). Since 1929 it has not sold cement in Oregon or in the territory in southwest Washington bordering the Columbia River, which was referred to as "distress territory" (R. 3250-51). An arbitrary price exists in that area to meet competition with out-of-state cement (R. 3186), and prices are so low Northwestern Portland does not sell in that area (R. 3251).

The Clayton Act is therefore inapplicable to Northwestern Portland.

**IV. Since Northwestern Portland makes no sales or shipments outside the state of Washington and does not compete in interstate commerce, the Commission had no jurisdiction over it in this proceeding**

The Commission specifically found "Northwestern Portland makes no sales or shipments outside the state of Washington" (Fdgs. 2, R. 15979).

This proceeding was brought under Section 5 of the Federal Trade Commission Act and Section 2 (a) of the Clayton Act, as amended. A reading of those statutes indicates plainly that the practices complained of must be "in [interstate] commerce." Northwestern Portland, not being engaged in interstate commerce, the Federal Trade Commission has no jurisdiction over it. We believe this has been definitely settled by the decision of this court in *Federal Trade Commission v. Bunte Bros., Inc.* (1941), 312 U.S. 349.

Under the decision in the *Bunte* case, it is not sufficient that the act or transaction "affects" interstate commerce. It must be "in" interstate commerce to confer jurisdiction upon the Federal Trade Commission.[8]

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[8]Other cases recognizing the above limitation on the jurisdiction of the Federal Trade Commission are as follows:

*Ward Baking Co. v. Federal Trade Commission* (C.C.A. 2d), 264 Fed. 330;

*Canfield Oil Co. v. Federal Trade Commission* (C.C.A. 6th), 274 Fed. 571;

*California Rice Industry v. Federal Trade Commission* (C.C.A. 9th), 102 F.(2d) 716;

*Winslow v. Federal Trade Commission* (C.C.A. 4th), 277 Fed. 206;

*Utah-Idaho Sugar Co. v. Federal Trade Commission* (C.C.A. 8th), 22 F.(2d) 122.

As Mr. Justice Frankfurter points out in the *Bunte* case, the Commission in 1935 attempted to secure from Congress an express grant of authority over transactions "affecting" interstate commerce, but failed.

In *Federal Trade Commission v. Algoma Lbr. Co.* (1934), 291 U.S. 67, 79, Mr. Justice Cardozo said:

> "The Federal Trade Commission was not organized until 1914, its jurisdiction then as now confined to interstate and foreign commerce."

## CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals is correct and that it should be affirmed.

Respectfully submitted,

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